

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADAUTO REYNOSO,	)	Case No. 09-3225 SC
	)	
Plaintiff,	)	ORDER RE: MOTIONS TO
	)	EXPUNGE NOTICE OF PENDING
v.	)	<u>ACTION</u>
	)	
PAUL FINANCIAL, LLC, SAXON	)	
MORTGAGE SERVICES, INC., QUALITY	)	
LOAN SERVICE CORP., CITYMUTUAL	)	
FINANCIAL, PROFESSIONAL APPRAISERS	)	
CO., and DOES 1 through 50,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	
KEVIN CULLINANE AND LISA	)	
CULLINANE,	)	
	)	
Interveners.	)	
	)	

**I. INTRODUCTION & BACKGROUND**

This suit involves Plaintiff Adauto Reynoso's ("Plaintiff") allegations that Defendants have engaged in an improper nonjudicial foreclosure upon his home. See Notice of Removal, Docket No. 1, Ex. A ("Compl."). Interveners Kevin Cullinane and Lisa Cullinane (collectively, the "Cullinanes") have filed a Motion to Expunge Notice of Pending Action. Docket No. 19 ("Cullinane MTE"). Defendant Mortgage Services, Inc. ("Saxon") has also filed a Motion to Expunge Notice of Pendency of Action. Docket No. 21 ("Saxon

1 MTE"). Plaintiff has submitted a separate Opposition to each  
2 Motion to Expunge. Dockets No. 24 ("Pl.'s Opp'n to Saxon MTE"), 25  
3 ("Pl.'s Opp'n to Cullinane MTE"). The Cullinanes and Saxon have  
4 both submitted Replies. Docket Nos. 26 ("Cullinane MTE Reply"), 33  
5 ("Saxon MTE Reply"). Having considered the submissions of each  
6 party, this Court has concluded that it would be premature to  
7 expunge the Notice of Pending Action at this time, and for this  
8 reason, the Motions to Expunge filed by Saxon and the Cullinanes  
9 are DENIED.

10 The Court will assume familiarity with the facts of this case,  
11 which are recounted in the Order re: Motions to Dismiss and Motions  
12 to Strike ("MTD Order"), to be issued concurrently with this Order.

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14 **II. LEGAL STANDARD**

15 "A party to an action who asserts a real property claim may  
16 record a notice of pendency of action in which that real property  
17 claim is alleged." Cal. Civ. Proc. Code § 405.20. A notice of  
18 pendency of action, otherwise known as a notice of lis pendens,  
19 "gives constructive notice that an action has been filed affecting  
20 title or right to possession of the real property described in the  
21 notice. Any taker of a subsequently created interest in that  
22 property takes his interest subject to the outcome of that  
23 litigation." La Paglia v. Super. Ct., 215 Cal. App. 3d 1322, 1326  
24 (Ct. App. 1989) (citations omitted). A party may seek to expunge a  
25 lis pendens if the pleading does not contain a real property claim  
26 of "probable validity." Cal. Civ. Proc. Code § 405.32. Upon a  
27 motion to expunge, the party seeking to support to notice of lis  
28 pendens must "establish[] by a preponderance of the evidence the

1 probable validity of the real property claim." Id.; see also  
2 Menjivar v. Trophy Props. IV DE, LLC, No. 06-3086, 2006 U.S. Dist.  
3 LEXIS 76245, \*69-70 (N.D. Cal. Oct. 6, 2006).

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5 **III. DISCUSSION**

6 The Court DENIES the Motions to Expunge WITHOUT PREJUDICE.  
7 The California Code of Civil Procedure places the burden on the  
8 claimant, who seeks to preserve the notice of pending action  
9 ("NPA"), to "establish[] by a preponderance of the evidence the  
10 probable validity of the real property claim." Cal. Civ. Proc.  
11 Code § 405.32. However, the provision does not state that a court  
12 should require plaintiff to make this showing by any particular  
13 time. The Court notes that neither Saxon nor the Cullinanes have  
14 stated that the NPA is presenting a burden or obstacle for any  
15 party. Plaintiff has been granted leave to amend his Complaint,  
16 and several causes of action, such as his fraud claims, have been  
17 dismissed because of Plaintiff's failure to meet pleading standards  
18 rather than because of any finding of implausibility. The Court  
19 therefore concludes that it would be appropriate to address the  
20 Motions to Expunge after Plaintiff has submitted an amended  
21 complaint.

22 The Court also notes that the attorney for Plaintiff has  
23 apparently misapprehended the burden placed upon Plaintiff by the  
24 statutes governing expungement. Rather than submit any affidavits  
25 or other evidence to establish that he will probably succeed on any  
26 of his claims, Plaintiff's attorney has simply relied upon his  
27 pleadings. This will not be sufficient to meet his burden. It  
28 will not be enough for him to state a valid claim that meets his

1 burden under Rule 12(b)(6) of the Federal Rules of Civil Procedure,  
2 since in this context he is required to establish a probability of  
3 success based on a "preponderance of the evidence." Id. For  
4 example, Plaintiff's papers in opposition to the Motions to Expunge  
5 provide lengthy analysis of the chain of title, but Plaintiff will  
6 be unable to prevail based on such defects unless and until he can  
7 establish, by evidence, the credibility of his offer to tender  
8 payment of the loan. See MTD Order, Part IV.A.5. He cannot meet  
9 this burden simply by pleading that he is willing and able to  
10 tender.

11 In addition, the Court will not deny the Motions to Expunge  
12 based solely on Plaintiff's assertions that proceeding with  
13 discovery may provide some hypothetical basis for concluding that  
14 his claims are valid. If Plaintiff believes that discovery is  
15 required to meet his burden under section 405.32, then he will need  
16 to identify good cause for that discovery.

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1 **IV. CONCLUSION**

2 In conclusion, the Court finds that although Plaintiff has not  
3 yet succeeded in meeting his burden with respect to the NPA, the  
4 matter is best resolved after Plaintiff has submitted his amended  
5 complaint. The Motions to Expunge submitted by Saxon and the  
6 Cullinanes are therefore DISMISSED WITHOUT PREJUDICE. The Court is  
7 willing to revisit this issue after Plaintiff has submitted an  
8 amended Complaint.

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10 IT IS SO ORDERED.

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12 Dated: November 16, 2009

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14 UNITED STATES DISTRICT JUDGE  
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